United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-2138

To be argued by
ANTHONY J. GIRESE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA, *ex rel.*
MARTIN KAHN and ERNEST FENDT,

Petitioners-Appellants,

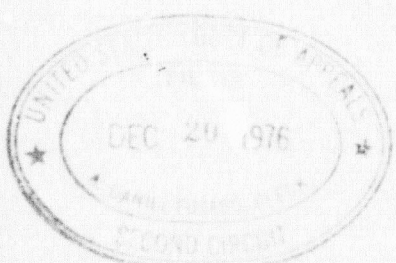
against

WALTER J. FLOOD, as Warden of the Nassau Correctional Facility, and THE PEOPLE OF THE STATE OF NEW YORK by and through THE HON. DENIS DILLON, District Attorney of the County of Nassau,

Respondents-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR RESPONDENTS-APPELLEES



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BRIEF FOR RESPONDENTS-APPELLEES

Preliminary Statement

This is an appeal from an order of the District Court for the Eastern District of New York (PRATT, J.), entered July 16, 1976, dismissing the petition by Martin Kahn and Ernest Fendt for a writ of habeas corpus pursuant to 28 U.S.C. §2254. A notice of appeal was filed on August 5, and a

certificate of probable cause was granted by Judge PRATT on September 24, 1976.

The writ was directed to a judgment of the County Court of Nassau County (YOUNG, J.), rendered October 7, 1974, convicting Kahn and Fendt, upon their pleas of guilty, of possession of gambling records in the first degree (New York Penal Law §225.20). Fendt was sentenced to 45 days of imprisonment and a fine of $1,000. Kahn was sentenced to 10 months' imprisonment and a fine of $2,500.

Opinions Below

The opinion and order of Judge PRATT denying the petition are unreported (*see* A21-23).* The opinion of the County Court of Nassau County on the hearing to suppress the evidence here at issue is unreported, as is the judgment of conviction. The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, unanimously affirmed the conviction without opinion on January 28, 1976. *People* v. *Kahn and Fendt*, 51 A.D.2d 595, 378 N.Y.S.2d 1014 (2d Dept.), *lv. to appeal denied*, 39 N.Y.2d 749, 751 (1976).

Statement of the Case

Introduction

On January 20, 1972, Sgt. John Lang of the Nassau County Police applied for a search warrant authorizing the search of an apartment in Nassau County for gambling

* Numerical references preceded by an "A" are to the pages of the appendix.

records and equipment. The application was based upon information received from a confidential informant, personal observations by the officer, and on information obtained in the course of a conversation between the officer and Thomas Barkley, the superintendent of the apartment building in question. The warrant was executed, gambling paraphernalia was seized inside the apartment, and the petitioners Kahn and Fendt were arrested and indicted for possession of gambling records and related crimes.

The Suppression Hearings in the Nassau County Court

At a subsequent initial suppression hearing held on October 24, 1973, in the County Court of Nassau County, the validity of the warrant was upheld in the face of an attack on the reliability of the confidenial informant and the sufficiency of the warrant. The court (ALTIMARI, J.) held that the information gained during the officer-superintendent conversations, together with the officer's own personal observations, were sufficient to establish probable cause regardless of the informant's reliability.

Kahn and Fendt then requested a second suppression hearing, alleging that the officer had lied to the warrant-issuing judge in the course of his application for the warrant, or that the superintendent had lied to the police officer. Pursuant to New York law [*People* v. *Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965) and its progeny], such a hearing was held before the County Court (YOUNG, J.) on December 11, 1973.* At that proceeding Sgt. Lang, Mr. Barkley, and certain other witnesses testified.

* Respondents will make the minutes of this proceeding available to the Court as a supplemental record.

The County Court, after hearing the evidence, decided that there was no basis for the claim that the police officer (the affiant for the warrant) had lied to the warrant-issuing judge (*see* A8). The court further found that the New York standard for review of such questions "is perjuriousness of the statements made by the affiant"; that accordingly attacks on the credibility of the superintendent who furnished the affiant with his information did not lie under New York law; and that, in any event, the recollection of the superintendent would not, on the merits of his testimony at the hearing, serve as a basis for controverting the warrant on the theory that he had lied to the police officer-affiant (*see* A7-A9). Accordingly, the court denied the motion to suppress.

Subsequent Proceedings

Kahn and Fendt subsequently pleaded guilty. On appeal to the Supreme Court of the State of N. · York, Appellate Division, Second Judicial Department, the petitioners repeated their attack on the veracity of the superintendent whose information, as communicated to the police officer, formed part of the basis for the warrant. The court rejected that argument. *People* v. *Kahn and Fendt*, 51 A.D. 2d 595, 378 N.Y.S.2d 1014 (2d Dept.), *lv. to appeal denied*, 39 N.Y.2d 749, 751 (1976).

Kahn and Fendt then sought a writ of habeas corpus in the United States District Court for the Eastern District of New York (Pratt, J.), again alleging that the County Court should have suppressed the evidence obtained pursuant to the warrant (*see* A16-A18). The writ was denied pursuant to the mandate of *Stone* v. *Powell*, —— U.S. ——, 96 S. Ct. 3037, 49 L.Ed.2d 1067 (1976) (A21-23).

ARGUMENT

As the New York courts judged petitioners' claim by essentially the same standard which would obtain in a federal court, the petition was properly dismissed [answering petitioners' brief].

In the district court, petitioners Martin Kahn and Ernest Fendt sought to establish that New York had denied them a "full, fair and adequate hearing" on their claim in the state courts that evidence seized pursuant to a search warrant should be suppressed, and so violated their rights under the fourth and fourteenth amendments to the federal Constitution. The gravamen of that claim, as presented to the state hearing court, was that one Thomas Barkley, the superintendent of an apartment building containing the petitioners' gambling operations, had lied to the police officer-affiant for the warrant.* The hearing court ruled

* On the papers before this Court, the clearest indicia of the claim appears in the arguments of counsel at the hearing, which the County Court incorporated in its decision (A4-5):

"MR. SUTTER: [defense counsel]:

"Well, if Your Honor please, there comes a time in every course of litigation *when new theories are advanced and when Appellate Courts rule upon them. I have never*—and I know Your Honor has read my argument before Judge Altimari and *I was very cautious to never accuse any Nassau County detective of perjury*, and I told him point blank that I would not do so unless I have concrete evidence of it. 'We have some evidence, which in Judge Altimari's opinion led, I would assume to the conclusion that there might have been a mistake made. Now, if a mistake has been made, we go way back to the original coram nobis situations. *I don't accuse the affiant of lying. I don't accuse any of these detectives of willfully perjuring themselves.' I do doubt the statements that were made by the superintendent*, and I wonder whether or not some day there will come a theory that if the entire warrant is a fraud upon the Court, *inadvertently*

(footnote continued on next page)

that New York law did not permit such a challenge, though that law would permit suppression if it could be shown that the affiant for the warrant [here Sgt. John Lang of the Nassau County Police Department] had lied to the warrant-issuing judge, under standards established in *People* v. *Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).*

The district court (PRATT, J.) held that *Stone* v. *Powell*, —— U.S. ——, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) was dispositive of the instant claim, finding that the state had offered Kahn and Fendt "an opportunity for full and fair litigation of a fourth amendment claim." Kahn and Fendt dispute that holding, arguing that the federal standard for reviewing a claim like the one presented to the state hearing court is different than that permitted by the courts of New York, and that that difference in standards renders the opportunity for a state hearing less than "full and fair" for purposes of review post-*Stone* v. *Powell*, *supra*. Kahn and Fendt are mistaken, for neither New York nor the

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brought about by law enforcement officials, whether or not that is not void ab initio. That is the issue we raise here today.

* * *

"Now, *the question presented here is is that warrant valid based upon perjury not of the police officer*, because the police officer reports accurately that which I say, but the whole thing is a hoax." (Emphasis in original throughout.)

* At various times in the state hearing court, on appeal to the Appellate Division, and in the district court, the petitioners also sought to establish, as an alternative theory, that Sgt. Lang, the affiant in the search warrant, did himself lie to the warrant-issuing judge. That claim was rejected on the merits in the state courts and is not repeated here. Suffice it to note that such a claim would fail on the merits before a federal tribunal [28 U.S.C. §2254(d)], and would certainly not be cognizable after *Stone* v. *Powell*, —— U.S. ——, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

federal courts would permit an attack on a search warrant where the affiant truthfully, and in good faith, relates to the warrant-issuing judge information gleaned from a citizen-informant who is lying to him.

In New York, a search warrant may be controverted if the affiant for that warrant can be shown to be "perjurious." *People* v. *Alfinito*, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965). Similarly, in this Court, a search warrant may be controverted where there is a showing that the affiant has made a "material and knowing misstatement in the affidavit. *United States* v. *Gonzalez*, 488 F.2d 833, 837 (2d Cir. 1973).* In New York, "a dedefendant is entitled to a hearing in which he may challenge the truthfulness of the allegations supporting a search warrant only where he attacks the veracity of the police informer, and not where, as here, the credibility of the source of information is challenged." *People* v. *Slaughter*, 37 N.Y.2d 596, 600, 338 N.E.2d 622, 624, 376 N.Y.S.2d 114, 118 (1975); *accord*, *People* v. *Solomine*, 18 N.Y.2d 477, 480, 223 N.E.2d 341, 276 N.Y.S.2d 882, 884 (1966). This Court has the same standard. *Mapp* v. *Warden*, 531 F.2d 1167, 1172-73 (1976) ["Probable cause is not defeated because

* As a matter of academic interest, it might be noted that there appears to be no real difference between the New York ["perjury"] and this Court's ["material and knowing misstatement"] standards with respect to review of an *affiant's* statements to a warrant-issuing judge. Whatever semantic difference there may be, it is certainly not of constitutional dimension. And, while some federal courts have indicated that it might be proper to reach below the affiant's statements in a case where that affiant recklessly and negligently relies on an informant whose *persona* or story is presumptively unreliable [*cf. United States* v. *Carmichael*, 489 F.2d 983, 989 (7th Cir. 1973)], there is no indication that the courts of New York would not be receptive to such a claim in a proper case. Of course, no such question is involved here, as the previously quoted portion of the County Court's decision conclusively demonstrates.

an informant may have erred or lied 'as long as the affiant accurately represented what was told him.' *United States* v. *Sultan*, 463 F.2d 1066, 1070 (1972).''] *See also United States* v. *Pond*, 523 F.2d 210, 214 (2d Cir. 1975). In sum, Kahn and Fendt would have been able to raise the claim at issue in neither the New York nor the federal courts. This being the case, the district court's invocation of *Stone* v. *Powell* to bar habeas corpus review was surely correct.

Further, it is clear that the standard for review adopted by New York and this Court is just and logical, serving the prime purpose of the exclusionary rule, *i.e.*, the ''deter-[rence of] future unlawful police conduct.'' *Stone* v. *Powell*, *supra*, 96 S. Ct. at 3047. It makes sense, in the light of that purpose, to exclude evidence obtained by affiant, normally a law enforcement official, who lies to a warrant-issuing judge. It makes no sense to penalize that affiant when he, in good faith and in accordance with the law, relies upon a citizen-informant who is himself, for whatever purpose, lying to law enforcement authorities. *See generally* Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971).

It remains only to note that petitioners point to a controversy which has arisen over the status of the state of New Jersey's rule in this area. New Jersey, in contrast to New York, does not permit attacks on search warrants on the theory that they were obtained pursuant to police [*i.e.*, *affiant*] perjury. *State* v. *Petillo*, 61 N.J. 165, 293 A.2d 649 (1972), *cert. denied* 410 U.S. 945 (1973). A district court in New Jersey granted a writ of habeas corpus, holding that the New Jersey rule is constitutionally deficient. *United*

States ex rel. Petillo v. *New Jersey*, 400 F. Supp. 1152 (D. N.J. 1975). On August 4, 1976, the United States Court of Appeals for the Third Circuit vacated that decision, and remanded the case back to the district court for reconsideration in the light of *Stone* v. *Powell* [—— F.2d ——, No. 75-2311]. The district judge, on remand, adhered to his original decision, holding that *Stone* v. *Powell* did not foreclose habeas corpus review, because the New Jersey rule had, in his opinion, prevented that petitioner from obtaining "an opportunity for a full and fair litigation" within the meaning of *Stone* [418 F. Supp. 686 (D. N.J. 1976), *second appeal to Third Circuit pending*]. Whatever result eventually obtains in that controversy, that case, cited by the instant petitioners, is of course inapplicable to the New York rule, which permits attacks on search warrants on the grounds of affiant perjury.

Conclusion

The order of the district court should be affirmed.

Respectfully submitted,

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Assistant District Attorneys
Of Counsel

December, 1976

#5710

Affidavit of Service by Mail

In re:

USA ex rel Kahn and Fendt v Flood

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on DEC 20 1976, 197..., he served 3 copies of the within Brief in the above named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Schulman & Laifer, Esqs.
16 Court Street
Brooklyn, New York
(Attorney for Petitioner Appellants)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 20th day of Dec. 1976

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1977